83-814

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERRY & GORE, LTD.,

Petitioner,

v.

ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether the attempt of the Administrator of the Illinois Attorney Registration and Disciplinary Commission to compel production by subpoena duces tecum of voluminous records of a law firm, including the firm's financial records for the purpose of conducting a general audit, in the absence of a specific complaint related thereto and absent clear authority to take such action, constitutes an unreasonable and unauthorized fishing expedition in violation of the firm's rights under the Fourth and Fourteenth Amendments.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioner, Berry & Gore, Ltd., respectfully prays that a writ of certiorari issue to review the decree of the Supreme Court of Illinois entered in this proceeding on August 18, 1983.

OPINION BELOW

The Supreme Court of Illinois rendered no opinion in this proceeding. The Order of that Court, denying petitioner's motion to quash the subpoena duces tecum at issue, appears in the Appendix hereto.

JURISDICTION

The decree of the Supreme Court of Illinois in this matter was entered on August 18, 1983 and this petition for writ of certiorari was filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, IV:

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS SUPREME COURT RULE 752, *Ill. Rev. Stat.* ch. 110A, § 752 (1981):

> (Set forth in Appendix hereto.)

ILLINOIS SUPREME COURT RULE 754, *Ill. Rev. Stat.* ch. 110A, § 754 (1981):

> (Set forth in Appendix hereto.)

STATEMENT OF THE CASE

The petitioner, Berry & Gore, Ltd., is a Chicago, Illinois law firm established as a professional corporation in 1972. Although its practice is general, the firm's emphasis is primarily in the area of personal injury representation. The Illinois Attorney Registration and Disciplinary Commission is the agency established in 1973 by the Supreme Court of Illinois to regulate the legal profession in that state; the respondent Administrator is the principal executive officer of the Commission and bears the responsibility for investigating and prosecuting alleged attorney misconduct.

Although various complaints alleging misconduct have been filed with the Commission by clients or third parties over the years against petitioner or its attorneys, the majority of such complaints have been dismissed; none has resulted in the institution of a formal disciplinary proceeding by the Administrator. Both petitioner and its attorneys have taken the position of full cooperation with the Commission concerning the provision of all available information related to specific complaints filed by clients or third parties. Despite this posture of cooperation, on April 13, 1983 the Administrator, through his Chief Counsel, corresponded with counsel for petitioner "... to delineate the scope of the Administrator's investigation of the law firm of Berry & Gore, Ltd." In part, this correspondence stated:

> We have reviewed all matters relating to the firm and conclude:
>
> —certain pending matters are ready for consideration and may be submitted to the Inquiry Board for decision without further delay;
>
> —additional information is required as to certain pending matters; and

> *—the general practices of the firm, as revealed by all matters, warrant investigation. Such investigation will be conducted under the auspices of file number 83-CI-2510, a new matter.* (emphasis supplied).

In expanding upon this latter statement, the Administrator's counsel further remarked: "A review of all matters instituted against the firm, the information contained therein and the Administrator's general investigation indicates that the firm's general practices in several areas may amount to unethical conduct by attorneys employed by the firm." The "practices" at issue, as alleged by the Administrator, were solicitation of professional employment, aiding the unauthorized practice of law, maintenance of spurious claims, and improper handling of client funds. None of these purported practices was ever made the foundation of a formal disciplinary proceeding against the firm or its members.

Contemporaneously with the April 13, 1983 letter, the Administrator served upon petitioner a subpoena duces tecum issued by the Clerk of the Illinois Supreme Court, which subpoena requested the production of the following documents with respect to the Administrator's new investigation:

> [1] All employment records and records of payment, whether salary, commission or otherwise, by the firm to either Arthur Reuter or Vincent Luisi from January 1, 1978 to the present. Include all original canceled checks reflecting payment to either Reuter or Luisi for any reason;
>
> [2] All lists, ledgers, records or documents of any kind reflecting the name or names of any person or persons to whom money has been paid for referral of potential clients from January 1, 1978 to the present. Specifically to be included is any record of money paid to any such person, and if paid by check, all original cancelled checks reflecting such payment;
>
> [3] All lists, ledgers, records or documents of any kind reflecting the name or names of any and all physicians,

health practitioners and or health treatment facilities to whom the firm has referred ten or more clients since January 1, 1978 to the present; and

[4] All original monthly bank statements and all original canceled checks for any account maintained by the firm into which claim settlement drafts, client funds or client related funds have been deposited from January 1, 1978 to the present.

The scope of attorney discipline in Illinois has historically been limited to specific instances of alleged attorney misconduct—not the "general practices" of a law firm—even subsequent to the establishment of the present disciplinary system. Moreover, unlike other state jurisdictions, the Illinois system has never adopted any provision or rule authorizing a general audit of the financial records of an attorney or firm. In light of the unprecedented nature and scope of the Administrator's investigation, especially with respect to the request for production of financial records for the admitted purpose of conducting a general audit thereof, on June 7, 1983 petitioner filed a motion to quash the Administrator's subpoena with the Supreme Court of Illinois.

Petitioner's motion and supporting memoranda raised the federal constitutional question which forms the basis of this Petition: whether the Administrator's subpoena duces tecum constituted an invalid fishing expedition beyond the scope of his authority in contravention of the Fourth Amendment's prohibition against unreasonable searches and seizures. In response to petitioner's motion, the Administrator simply presumed existence of the necessary authority to investigate a firm's "general practices" and conduct an audit, and presented contested allegations concerning specific instances of suspected misconduct which purportedly established probable cause to embark upon the broader investigation. On August 18, 1983, the Illinois Supreme Court entered an Order denying petitioner's motion without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE ILLINOIS SUPREME COURT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ADDRESSING FOURTH AMENDMENT LIMITATIONS ON AN AGENCY'S SUBPOENA POWER.

The Fourth Amendment to the United States Constitution mandates in part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." In the seminal case of *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209 (1946), this Court noted the "gist" of the Fourth Amendment's protection with respect to a subpoena duces tecum ". . . is in the requirement that the disclosure sought shall not be unreasonable." In elaborating on the reasonableness requirement, the Court established three guidelines: (1) the purpose of the investigation for which the subpoena is issued must be authorized under applicable law; (2) the documents sought must be relevant to the inquiry; and (3) the subpoena must contain a specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. *Id.*

The rationale for this reasonableness requirement has been eloquently stated by Mr. Justice Holmes in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305-6 (1924):

> Anyone who respects the spirit of the law as well as the letter of the Fourth Amendment would be loathe to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire. . . , and to direct fishing expeditions into private papers on the possi-

> bility that they may disclose evidence of crime. . . . The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. *It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. . . .*
>
> The right of access . . . is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. *Some ground must be shown for supposing that the documents called for do contain it. . . .* (emphasis added)

See also, *Hale* v. *Henkel,* 201 U. S. 43 (1906).

In *American Tobacco,* the Court affirmed the refusal of the district court to require, on behalf of the Federal Trade Commission, the production by tobacco companies of voluminous documents because the request therefor was overly-broad in terms of the relevant inquiry and thus constituted an unauthorized "fishing expedition" in violation of the Fourth Amendment's proscriptions. Conversely, in *Oklahoma Press, supra,* the Court upheld the actions of the Federal Wage and Hour Administrator in subpoenaing business records of certain publishing companies in order to determine whether the companies were subject to and in violation of the minimum wage requirements of the Fair Labor Standards Act. In balancing the Fourth Amendment tension between private security and the public interest occasioned by the administrative agency's investigation, the Court in *Oklahoma Press* relied heavily on the fact that the agency's authority to compel the requested documentation was clearly established by applicable statute and was exercised pursuant to the manifest intent of Congress. 327 U. S. at 179-98. See also, *United States* v. *Morton Salt Co.,* 338 U. S. 632 (1950).

However, unlike the agency's authority in *Oklahoma Press,* the Administrator's authority to conduct an investigation into the "general practices" of an Illinois law firm is not clearly established. Rather, historically in Illinois, the investigatory authority of the attorney disciplinary system has been limited to specific instances of alleged misconduct. An explained by one commentator:

> From statehood until 1933 the disbarment procedure in Illinois was commenced by the filing in the Supreme Court of an information by the Attorney General, on which the Court issued a rule on the attorney to answer. The first reported disbarment case is *People ex rel. Wright v. Lamborn,* 2 Ill. 122, decided at the December term in 1834, and the information procedure was employed.
>
> The first Supreme Court Rule relating to disciplinary proceedings was not adopted until the September term in 1876. It codified what was the "Information" procedure then in use. It provided for the filing of an Information to strike an attorney's name from the roll of attorneys, "making clear and specific charges, giving time, place and acts of misconduct, with reasonable certainty, signed by the Attorney General or some state's attorney."
>
> The rule was amended on February 13, 1909 to enlarge the persons entitled to sign the Information to the "president and secretary of a regularly organized bar association, either incorporated or unincorporated, or any person aggrieved by the misconduct of the attorney charged." It required the Information to be signed under oath if made by the aggrieved person, and an aggrieved person had to be represented by an attorney.

Murphy, T. J., "A Short History of Disciplinary Procedures in Illinois," 60 *Ill. Bar J.* 528, 529 (1972). By 1938, the Court had amended the disciplinary procedure by deleting the information practice and empowering the boards of the Illinois State Bar Association and Chicago Bar Association to act as Commissioners of the court for purposes of filing and investigating complaints concerning attorney misconduct and making reports and

recommendations to the court as to appropriate discipline. *Ill. Rev. Stat.* ch. 100, § 259.9 (1938). In 1973, the court revised the disciplinary structure and established the Attorney Registration and Disciplinary Commission. *Ill. Rev. Stat.* ch. 110A, § 751 *et seq.* (1973).

Under the new system, an Administrator was appointed whose delineated duties include the following:

> On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate *conduct* of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

Ill. Rev. Stat. ch. 110A, § 752(a) (1981) (emphasis added). The Administrator's authority to obtain compulsory process is established in Illinois Supreme Court Rule 754:

> The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths. Upon request of the Administrator, the respondent or the Inquiry or Hearing Boards, the Clerk of the Court shall issue subpoenas for the appearance of witnesses and subpoenas to require the production of books, records, papers and other items *relevant to the matters under investigation or to pending cases. . . .*

Ill. Rev. Stat. ch. 110A, § 754 (1981) (emphasis added).

Notably, pursuant to Rule 752(a), the Administrator is empowered to investigate "conduct" of attorneys, not "general practices" of law firms. Under both the current rules and the historical context of attorney discipline in Illinois, his investigatory authority is thus reasonably limited to specific instances of misconduct on the part of Illinois lawyers. Moreover, unlike other state jurisdictions which, recognizing the intrusiveness of such procedure into the inner-workings of a law firm, specifically provide for audits of attorney accounts by rule or otherwise,

the Administrator is nowhere authorized to conduct general audits of a firm's financial records under Illinois law.[1]

Petitioner does not dispute the authority of the Administrator to obtain a subpoena duces tecum in furtherance of his investigation of specific instances of attorney misconduct. However, the Administrator simply does not possess authority to embark upon the "fishing expedition" reflected in the April 1983 subpoena at issue here by conducting a search of petitioner's records, "... relevant or irrelevant, in the hope that something will turn up." *Federal Trade Commission* v. *American Tobacco Co., supra,* 264 U. S. at 306. The Administrator, in effect, seeks to conduct an inquisition into the "general practices" of a personal injury firm without providing the firm's members the opportunity to confront the allegations of specific misconduct upon which the inquisition is purportedly based, contrary to the intent by which the Illinois disciplinary system was established. The Administrator simply lacks authority to

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[1] *See, e.g. Iowa Supreme Court* Rule 121.4; (authorizing audits of attorney accounts); Interpretive Guideline No. 2—Re: Preserving Identity of Funds and Property of Client, *Delaware Code Ann.* DR 9-102 (requiring maintenance of specified records and authorizing spot audits); Rule 1:21-6 of the *Rules Governing the Courts of New Jersey* (requiring maintenance of specific records and authorizing examination thereof by the disciplinary agency); *Washington Disciplinary Rules for Attorneys* 13.1-13.5 and accompanying Regulations and Guidelines (authorizing audits of attorneys accounts); *Maryland Rules of Procedure BV 18* (authorizing audits of attorneys accounts upon a showing of good cause"); *Rules and Regulations of the North Carolina State Bar,* Article IX, § 28 (authorizing audit of specified attorney account records); *Maine Bar Rules,* Rule 7(s) (authorizing audit of attorney accounts after institution of formal disciplinary proceedings); *New Hampshire Supreme Court Rule* 37, § 7 (specifies self-certification of trust account procedures or willingness to submit to compliance audit; authorizes audit of account records by order of Court); *Arizona Rules of Supreme Court,* Rule 29(f) (authorizing audit by order of court); *Florida Rules of Court,* Rule 11.02(4) (authorizing audit of account records "... insofar as they may relate in any way to the transaction, occurrence or client in question ...")

embark upon such an inquisition, and therefore lacks authority to obtain the overly-broad discovery sought.

Clearly, the public has an interest in the effective enforcement of the Code of Professional Responsibility applicable to attorneys. Yet, members of the legal profession also possess recognized interests, which include:

> . . . the interests of men to be free from officious intermeddling, whether because irrelevant to any unlawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. *Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.* . . .

Oklahoma Press Co. v. *Walling, supra,* 327 U. S. at 213 (emphasis added). The Administrator's present inquiry, unauthorized by law, has attained the level of persecution of petitioner. It is this very danger, contrary to the principles espoused by the Court as set forth above, that the Fourth Amendment was intended by our forefathers to prevent.

This conflict between the Order of the Illinois Supreme Court allowing the Administrator to embark upon an unauthorized fishing expedition, and the laudatory principles inherent in the Fourth Amendment as expressed by the Court, justifies the grant of certiorari to review the ruling below.

II.

THE RULING BELOW HAS DECIDED, *SUB SILENTIO,* A NOVEL AND IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE ADDRESSED BY THIS COURT.

This Court has previously decided that attorneys, like other citizens are entitled to the full protections of the Constitution,

including the right to due process afforded by the Fourteenth Amendment. *See, e.g., In re Ruffalo,* 390 U. S. 544 (1968); *Spevack* v. *Klein,* 385 U. S. 511 (1967); *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963). In the proceeding below, the Administrator seeks to subpoena the financial records of a law firm for the purposes of conducting a general audit of the firm's client accounts, absent any express authorization for such action. In light of the intrusive nature of an audit, both with respect to the firm and its clients, the adoption of a rule specifically authorizing such activity has been the procedure utilized by various states to empower the applicable disciplinary agency to embark upon an excursion into the inner workings of a law office.[2] Petitioner submits that the limitations imposed by an audit rule are a prerequisite to the conducting of general audits of attorney accounts in order to avoid the potential abuse of such power, utilized without restriction and in possible violation of Fourth and Fourteenth Amendment rights. Moreover, an audit rule provides members of the bar with notice that their accounts are subject to scrutiny by the disciplinary agency. The few state courts which have addressed the propriety of attorney audits rely heavily on the applicable audit rule in upholding such action. *See, e.g., In re Kennedy,* 442 A. 2d 79 (Del. Supr. 1982); *Andresson* v. *Bar Association of Montgomery County,* 305 A. 2d 845 (Md. 1973).

By its Order denying petitioner's motion to quash the subpoena duces tecum, the Supreme Court of Illinois has, *sub silentio,* granted the Administrator unlimited and *carte blanche* discovery powers which are unimpeded by constitutional restraints. Indeed, the Illinois court, by its failure to render an opinion, has attempted to wholly avoid the application of those restraints on the attorney disciplinary process. This avoidance cannot be countenanced, for the issues raised are substantial. Is the investigation by a disciplinary agency, like that of the Stuart's Star Chamber or the Spanish Inquisition, self-defining

[2] See no. 1, *supra,* p. 10.

and thus beyond the purview of the Fourth Amendment? Are attorneys entitled to notice that their client accounts may be audited and should such audits be conducted pursuant to established guidelines under the due process clause of the Fourteenth Amendment?

These issues have heretofore not been addressed by this Court, yet they are of substantial import to the practices of hundreds of thousands of lawyers across the nation. Consideration of such issues warrants the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the ruling of the Supreme Court of Illinois denying petitioner's motion to quash the subpoena duces tecum at issue.

Respectfully submitted,

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APPENDIX 1

August 18, 1983

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THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

M.R. 3093

In re: Berry & Gore, Ltd.

"This cause coming to be heard on the motion of the respondent, a response having been filed by the Administrator of the Attorney Registration and Disciplinary Commission, a reply having been filed by the respondent, and the court being fully advised in the premises;

IT IS ORDERED that the motion to quash the subpoena *duces tecum* of April 13, 1983, is *denied.*"

JH/cjv
cc: Attorney Registration and Disciplinary Commission
(John C. O'Malley, Chicago)

APPENDIX 2

ILLINOIS SUPREME COURT RULE 752, *Ill. Rev.* Stat. ch. 110A, § 752 (1981):

The Court will appoint an Administrator of the registration and disciplinary system to serve at its pleasure as the principal executive officer of the registration and disciplinary system. The Administrator shall receive such compensation as the Court authorizes from time to time.

Subject to the supervision of the Commission, the Administrator shall:

(a) On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate conduct of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute;

(b) Assist each Inquiry Board in its investigations and prosecute disciplinary cases before the Hearing Boards, the Review Board and the Court;

(c) Employ at such compensation as may be authorized by the Commission such investigative, clerical and legal personnel as may be necessary for the efficient conduct of his office;

(d) Discharge any such personnel whose performance is unsatisfactory to him; and

(e) Maintain such records, make such reports and perform such other duties as may be prescribed by the Commission from time to time.

ILLINOIS SUPREME COURT RULE 754, *Ill. Rev. Stat.* ch. 110A, § 754 (1981):

The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person

authorized by law to administer oaths. Upon request of the Administrator, the respondent or the Inquiry or Hearing Boards, the Clerk of the Court shall issue subpoenas for the appearance of witnesses and subpoenas to require the production of books, records, papers and other items relevant to the matters under investigation or to pending cases. The Administrator, the respondent or the Inquiry or Hearing Boards may report to the Court the failure or refusal of any person to attend and testify in response to any subpoena or to produce the items specified in a subpoena *duces tecum*.

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

SUPREME COURT RULE 753. Inquiry Hearing and Review Boards

(a) Inquiry Boards.

(1) There shall be an Inquiry Board. It shall consist of not less than 21 members of the bar of Illinois. The members of the Board shall be appointed by the Commission to served annual terms as commissioners of the court. The Commission may appoint such additional members of the Board as it deems necessary to carry on the work of the Board.

(2) The Board shall inquire into and investigate matters referred to it by the Administrator. The Board

may also initiate investigations on its own motion and may refer matters to the Administrator for investigation.

(3) After investigation and consideration, the Board shall dispose of matters before it by voting to dismiss the charge, to discontinue an investigation undertaken on its own motion or to file a complaint with the Hearing Board.

(4) The Board may act in panel of not less than three members each, as designated by the Commission. The Commission shall also designate one of the members of each panel as chairman. The majority of a panel shall constitute a quorum and the concurrence of a majority shall be necessary to a decision. In the absence of chairman of a panel at a meeting, the members present shall designate one of their members as acting chairman.

SUPREME COURT RULE 754. Compulsory Process

The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths. Upon request of the Administrator, the respondent or the Inquiry or Hearing Boards, the clerk of the Court shall issue subpoenas to require the production of books, records, papers and other items relevant to the matters under investigation or to pending cases. The Administrator, the respondent or the Inquiry or Hearing Boards may report to the Court the failure or refusal of any person to attend and testify in response to any subpoena or to produce the items specified in the subpoena duces tecum.

COMMISSION RULE 2.2

Rule 2.2 — Function and Procedure of Inquiry Panel. It is the function of the Inquiry Panel to determine whether there is sufficient evidence for the filing of a complaint with the Hearing Board. The Panel should review the investigation made by the Administrator and conduct or direct any additional investigation it feels appropriate. It shall have the

authority to require the attendance of members thereof, and subpoenas for this purpose shall be issued by the clerk of the Court upon request of the Chairman of the Panel. However, it is not the function of the Inquiry Panel to determine the merits of the case, and its proceedings shall not be permitted to appear before the Panel as a matter of right, but he may appear in the discretion of the Panel.

Before a complaint is voted, if the lawyer has not previously appeared before the Panel, or a member thereof, the Inquiry Panel or the Administrator shall send a notice to the lawyer advising him that a complaint may be voted. The notice shall give a brief description of the subject matter and afford the lawyer an opportunity to make an oral statement before the Inquiry Panel, or a designated member thereof, on a date set in a notice to the lawyer. The notice shall be sent by the Administrator by regular mail, postage prepaid, addressed to the lawyer at the address shown on the Master Roll of Attorneys maintained by the Administrator, or at the last known business or residence address of the lawyer in the event he is not listed on the Master Roll.

An agenda shall be prepared in advance for each meeting of an Inquiry Panel and minutes of the meeting shall be kept, indicating the disposition of each matter on the agenda. A decision shall be made on each case as to whether a complaint should be voted, the case dismissed or the case passed for further action.

Matters before the Panel shall be disposed of promptly. In any instance where a lawyer is permitted to appear before the Panel, or a member thereof, he may be represented by counsel. No proceedings before the Panel may be continued more than once at the request of either the lawyer or his counsel, except under extraordinary circumstances.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, a denial of a motion to quash a subpoena is not a final judgment or decree within the meaning of 28 U.S.C. § 1257(3)(1970). In addition, there has been no final ruling in this proceeding by the Supreme Court of Illinois. Without such a ruling, there is no final judgment from which this Court may take jurisdiction.

Second, the Petitioner has raised no significant federal question. The disciplinary proceedings pending against Petitioner only involve questions of state law. A Fourth Amendment issue has been raised only to delay those state proceedings.

Third, the denial of the motion to quash the subpoena by the Supreme Court of Illinois is in accord with United States Supreme Court decisions. Subpoenas issued by investigatory bodies will be upheld as long as the information sought is reasonable in scope, relevant to the inquiry and definite in nature. Since the subpoena at issue complied with the criteria outlined by this Court, the Supreme Court of Illinois properly denied Petitioner's motion to quash the subpoena.

ARGUMENT

I. PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3).

A. Granting Certiorari Requires A Final Judgment.

Petitioner invokes jurisdiction of this court pursuant to 28 U.S.C. § 1257(3) (1970). That statute grants the Supreme Court power to review state litigation only after the highest court of a state has rendered a final judgment or decree.

Judgment is final for the purposes of a writ of error to the Supreme Court when it terminates the litigation between the parties on the merits of the case. Nothing remains to be done

but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. *See, Mower* v. *Fletcher*, 114 U.S. 127, 128 (1885).

B. There Is No Final Judgment In This Case.

Petitioner is a Chicago area law firm established as a professional corporation. That firm handles a large volume of personal injury and property damage claims. Since 1973, over seventy-three different investigations have been initiated against Petitioner by the Administrator of the Attorney Registration and Disciplinary Commission (Administrator). The majority of the investigations were initiated by client complaints.

After a complete review of all investigations, Petitioner was informed by a letter dated April 13, 1983, a copy of which is set forth in Appendix One, that the firm's longstanding practice of solicitating clients, of improperly handling client funds, of filing and maintaining unwarranted and spurious claims, and of aiding in the unauthorized practice of law, was being investigated. In furtherance of the Administrator's investigation, a subpoena duces tecum issued compelling the production of certain documentation. A copy of this subpoena is set forth in Appendix Two.

Petitioner filed a motion with the Supreme Court of Illinois on June 7, 1983, to quash the Administrator's subpoena. Subsequently, the Administrator filed a response to the motion to quash, a copy of which is set forth in Appendix Three. On August 18, 1983, the Illinois Supreme Court entered an order denying Petitioner's motion. *In re Berry and Gore*, M.R. 3093 (S.Ct.Ill.)

An order denying a motion to quash a subpoena duces tecum is not a final appealable decision. *See, e.g., Cobbledick* v. *United States*, 309 U.S. 323 (1940). A party will not be allowed to take a ruling to an upper court where the result of the review would be to halt the orderly progress of a cause. *See, e.g., Segurola* v. *United States*, 275 U.S. 106, 112 (1927).

The Administrator's investigation into Petitioner's misconduct is pending before the Attorney Registration and Disciplinary Commission Inquiry Board. It is the function of the Inquiry Board to determine whether there is sufficient evidence for the filing of formal charges against Illinois attorneys. Ill. Rev. Stat. ch. 110A, § 753(a) (1983); A.R.D.C. art. II, § 2.2 (1983). In filing his petition, Petitioner seeks to halt the orderly progress of existing proceedings before the Inquiry Board. A Supreme Court review would, at this time, delay the investigation and frustrate the effectiveness of the attorney disciplinary system.

C. This Case Does Not Come Within One Of The Exceptions To The Final Judgment Rule.

This Court recognizes four categories of cases in which federal jurisdiction exists even where there is no final judgment pursuant to 28 U.S.C. § 1257. *Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 477 (1975). None of these exceptions applies to the circumstances of the present case. The first category includes matters in which there are further proceedings pending in the state courts, but the federal issue is conclusive and the outcome of the proceeding is preordained. Because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. *Id.*, at 479. This exception does not apply to the present case. The Administrator and Inquiry Board have not had the opportunity to review the information sought in the subpoena duces tecum. Until that material is made available to the Commission, it cannot be conclusively determined whether there has been professional misconduct by the Petitioner. Since the information and documents have not been subject to inspection, production of the materials will not preordain the outcome of the proceeding.

In the second category are cases in which the federal issue will require decision regardless of the outcome of anticipated state court proceedings. That is, nothing would happen in state court proceedings which would foreclose decision on the federal issue. *Id.*, at 480. This exception does not apply to

the present case. In the event that charges are dismissed against Petitioner on state issue grounds, the alleged constitutional issue would not need to be addressed.

In the third category are cases in which later review of the federal issue will not be available because it will be mooted or the Petitioner would be precluded from raising it again. *Id.*, at 481. This exception does not apply to the present case. The Petitioner may properly raise constitutional claims at any time during disciplinary proceedings.

In the final category are cases in which a decision on the federal issue would preclude any further litigation on the relevant cause of action rather than merely control the nature and character of, or determine the admissibility of evidence in, the state court proceeding to come. *Id.*, at 482-483. This exception does not apply to the present case. Whether or not the information sought in the subpoena duces tecum is produced, the Administrator is not precluded from prosecuting Petitioner for various acts of professional misconduct.

II. PETITIONER HAS RAISED NO SUBSTANTIAL FEDERAL QUESTION.

Mere allegations that a federal question exists will not confer federal jurisdiction. Rather, there must be a real substantive federal question on which the case turns in order to involve the jurisdiction of the Supreme Court. *See, Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). The petition will be dismissed if it appears that the federal question is merely formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy. *Id.*

No genuine federal question has been raised in this matter.

This Court has long recognized the authority of the state to regulate its professions. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). Lawyers have historically been con-

sidered officers of the court. *See, e.g., In re Primus*, 436 U.S. 412, 422 (1978). In Illinois, the power to discipline an attorney is inherent in the Supreme Court of Illinois. *In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E. 2d 873, *cert. denied*, 358 U.S. 881, rehearing denied, 358 U.S. 923 (1958).

As part of the Illinois Supreme Court's inherent authority, the investigation into Petitioner's practice was instituted. This investigation is limited to determining whether Petitioner violated the Illinois Code of Professional Responsibility which governs attorneys. As such, the only question involved in this case is that of state law. No federal statute or provision is under consideration in this case. Petitioner, however, asserts federal jurisdiction by claiming that his Fourth Amendment rights have been violated. Such a claim is specious and has been raised merely to delay the state proceedings.

III. THE ORDER OF THE ILLINOIS SUPREME COURT DENYING PETITIONER'S MOTION TO QUASH THE COMMISSION'S SUBPOENA DUCES TECUM IS IN ACCORD WITH APPLICABLE SUPREME COURT DECISIONS.

Even if a federal question existed, it is clear that Petitioner's Fourth Amendment rights were not violated when the Illinois Supreme Court denied the motion to quash the subpoena duces tecum. The Fourth Amendment's protection against unlawful search and seizure is satisfied when a subpoena is issued by a body which has authority to investigate and the subpoena is issued for a lawfully recognized purpose. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, (1946). The documents sought must be definite and relevant to the inquiry. *Id.*, at 208-209. The gist of the Fourth Amendment protection is that the disclosure shall not be unreasonable. *Id.*, at 209. Reasonableness, however, cannot be reduced to a formula. What is relevant or excessive in breadth is variable in relation to the nature, purposes and scope of the inquiry. *Id.*

The subpoena was issued by the Clerk of the Supreme Court of Illinois at the request of the Administrator of the Attorney Registration and Disciplinary Commission pursuant to his power to investigate attorney misconduct pursuant to Illinois Supreme Court Rule. Ill. Rev. Stat. ch. 110A, § 752, (1983). It was issued in accordance with the *Oklahoma Press* guidelines.

The information sought in the subpoena was specific, limited and relevant to the inquiry. The materials to be produced are not excessive but are adequate in relation to the purpose and scope of the investigation. The Fourth Amendment guards against abuses of the subpoena power only by way of too much indefiniteness or breadth in the things required to be produced. *Oklahoma Press*, 327 U.S. at 208. In that the Supreme Court of Illinois upheld the subpoena, such indefiniteness and overbreadth did not apply in this case.

Because the subpoena duces tecum complied with the criteria set forth in the *Oklahoma Press* case, there is no controversy for this Court to consider.

CONCLUSION

For the reasons set out above, Respondents respectfully submit the Petition for Writ of Certiorari be denied.

Respectfully submitted,

John C. O'Malley

Jane Carroll, law student, Loyola University of Chicago, assisted in the preparation of this brief.

Appendix One

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION
of the
SUPREME COURT OF ILLINOIS

COMMISSIONERS
JAMES H. BANDY, CHAIRMAN
LESTER ASHER
GEORGE J. COTSIRILOS
EDWARD C. FINNEGAN
ALFRED F. WOODWARD

ADMINISTRATOR
CARL H. ROLEWICK

ASSISTANT ADMINISTRATORS
JOHN C. O'MALLEY, CHIEF COUNSEL
JOHN M. OSWALD, CHIEF INVESTIGATOR

Chicago
April 13, 1983

SENIOR COUNSEL
MARY M. CONRAD
JEROME LARKIN

COUNSEL
LAWRENCE W. CARROLL
DANIEL A. DRAKE
JAMES J. GROGAN
THERESA M. GRONKIEWICZ
JOHN A. HOLTAWAY
DEBORAH M. KENNEDY

SPECIAL COUNSEL
PEYTON H. KUNCE

Mr. William J. Martin
William J. Martin, Ltd.
33 North Dearborn Street - #930
Chicago, Illinois 60602

Dear Mr. Martin:

This letter is in furtherance of our conversation of March 3, 1983 and will delineate the scope of the Administrator's investigation of the law firm of Berry & Gore, Ltd. The Administrator's investigation has been stayed pending disposition of case M.R. 2588 in the Supreme Court of Illinois and, as to certain matters, at the request of the firm due to the pendency of a federal grand jury investigation. The Supreme Court denied the motion to quash subpoena in case M.R. 2588 on October 4, 1982 and the Administrator has not been advised that the grand jury investigation is continuing. The Administrator has determined that there is no impediment to the investigation going forward at this time.

BACKGROUND

The records of the Commission reveal that inquiries have been instituted against the firm or its employees in forty-one matters since January 1, 1978, the date the Commission's records were computerized. Manual records indicate that prior to 1978 thirty-two additional matters were considered. A copy of a listing of the forty-one matters referred to above, reflecting the date of disposition or present status, is attached.

We have reviewed all matters relating to the firm and conclude:

- certain pending matters are ready for consideration and may be submitted to the Inquiry Board for decision without further delay;

- additional information is required as to certain pending matters; and

- the general practices of the firm, as revealed by all matters, warrant investigation. Such investigation will be conducted under the auspices of file number 83-CI-2510, a new matter.

PENDING MATTERS

Further information required in connection with pending matters is as follows:

80-CI-2217 atc The Administrator - File No. 80-CI-2217 arises from disclosures or allegations in the Chicago Sun Times (The Accident Swindlers). Messrs. Berry and Gore have not responded to the Administrator's letter of July 24, 1980; rather they have asserted the privilege against self-incrimination. The Administrator believes that the federal grand jury investigation in the matter has concluded without recommendation of formal action and the Administrator calls upon the firm to respond at this time;

80-CI-21513 atc Fred Lenczewski - The firm requested a stay of the Administrator's investigation pending disposition of related civil litigation. Please relate the status of the litigation;

80-CI-21775 atc Stephen Curry, M.D. - The matter arises from a physician's allegation that he was not paid for services rendered from the proceeds of a settlement. Please forward a copy of the settlement distribution sheet reflecting disbursement in the matter at issue;

80-CI-2013 atc Felanthus Davis - Please identify Richard Flemming and describe his relationship with the firm. Specifically, state whether Flemming referred Davis to the firm and, if so, whether Flemming was paid for the referral;

82-CI-2211 atc Aristidis Tousis - Please describe the relationship of Alan M. Katz with the firm at any time; describe the nature of any agreement for referral of cases by the firm to Katz; and list all such referrals and account for any and all money paid to Katz by the firm, whether such payment is in the nature of fees or constitutes payment or reimbursement for staff or office;

82-CI-21618 atc Earl Davis - The Administrator inadvertently failed to forward the Davis complaint to the firm following the Supreme Court's disposition of case M.R. 2588. A copy of the complaint will be forwarded under separate cover;

82-CI-21713 atc Mary M. Nolen - Same as 82-CI-21618 above; and

83-CI-2493 atc Lolita Johnson - Ms. Johnson's complaint was received April 4, 1982 and will be forwarded under separate cover.

FILE NO. 83-CI-2510

A review of all matters instituted against the firm, the information contained therein and the Administrator's general investigation indicates that the firm's practices in several areas may amount to unethical conduct by attorneys employed by the firm. Those practices are:

- Solicitation of professional employment

The firm appears to be engaged in the systematic solicitation of legal employment. This practice includes payment to third persons for the referral of prospective clients to the firm;

- Aiding the unauthorized practice of law

The firm appears to employ persons who are not attorneys for the purpose of advising clients and negotiating and settling client claims;

- Maintenance of unwarranted or spurious claims

The firm appears to be engaged in the regular practice of referring clients to certain physicians, health practitioners and health treatment facilities for the purpose of generating apparently compensable expenses; and

- Improper handling of client funds

The firm may not properly account for funds generated by client claims. This includes the failure to preserve the identity of client funds and to promptly and/or fully account to the client for the handling of funds. The firm may delay transmitting or fail to transmit funds to third persons pursuant to settlement distribution agreements.

REQUEST FOR INFORMATION

The Administrator intends to take the statements of Bruce Berry and Richard Gore, as well as other employees of the firm. Prior to

doing so, it will be necessary for the Administrator to obtain certain information from the firm. Please provide:

- All employment records and records of payment, whether salary, commission or otherwise, by the firm to either Arthur Reuter or Vincent Luisi from January 1, 1978 to the present. Include all original cancelled checks reflecting any payment to either Reuter or Luisi for any reason;

- A listing of all persons, including addresses, to whom money has been paid for referral of potential clients for the period January 1, 1978 to the present. Include an accounting of amounts paid and, if paid by check, copies of all original cancelled checks reflecting any such payment;

- A listing of all physicians, health practitioners and health treatment facilities, with addresses, to whom the firm has referred ten or more clients since January 1, 1978 to the present; and

- Original monthly bank statements and all cancelled checks for any account maintained by the firm into which settlement drafts, client funds, or client related funds have been deposited from January 1, 1978 to the present.

In order that the matter may go forward without delay, I am enclosing a subpoena duces tecum compelling the production of the information referred to above on or before May 13, 1983.

If you have any questions, please let me know.

Very truly yours,

John C. O'Malley

JCO'M:ms
Encs.

BRUCE S. BERRY and RICHARD S. GORE

INQUIRY FILES

FILE NUMBER	COMPLAINING WITNESS	STATUS
78 CI 2215	Lucille Constant	AD 1/05/79
79 CI 2883	Thomas Augustyn	AD 12/19/79
79 CI 2884	Lillie M. Shine	PD 2/05/80
79 CI 2899	Edgar L. Sherard, Jr.	Open JCO'M - Panel G
79 CI 2916	Diana M. Howerton	AD 11/06/79
79 CI 21024	Jack W. Byans	AD 6/05/80
	Aine M. Byans	
80 CI 2216	Carl H. Rolewick	AC 9/23/80
80 CI 2217	Carl H. Rolewick	Open JCO'M - Panel G
80 CI 2246	Lupe Giralamo	AD 6/05/80
80 CI 2332	Kristen Baier	Open JL - Panel G
80 CI 2361	Darnell Williams	Open JL
80 CI 2382	Earnesti Lanier	AD 7/10/80
80 CI 2414	Vergie Williams	AD 11/06/80
80 CI 2441	Sandra P. Burson	Open JL - Panel G
80 CI 2539	Alvin Winograd	AD 9/17/80
80 CI 2567	Jessie Moss	Open JCO'M - Panel G
80 CI 2677	Rosa Burgos	Open JL
80 CI 2888	William Benson III	Open JCO'M - Panel G
80 CI 21406	Joann Darden	AD 12/09/80
80 CI 21414	Jose D'Avila	Open JCO'M
80 CI 21466	James Moore	Open JCO'M - Panel G JJG
80 CI 21513	Angelo Karras	Open JCO'M
	Fred Lenczewski	
80 CI 21775	Stephen Curry, M.D.	Open JCO'M - Panel G
81 CI 2013	Felanthu Davis	Open JCO'M - Panel G
81 CI 2247	Walter Borom	Open JCO'M
	Willie Spencer	
81 CI 2428	Bobby R. Chumley	Open JCO'M
	Ardell Holland	
	Frank Lewis	
81 CI 2958	Sheila Jackson	AD 9/29/81
81 CI 21211	George S. Butler	AD 2/11/82
	Cheryl C. Taylor	
82 CI 2211	Aristidi Tousis	Open JCO'M - Panel G
82 CI 2441	William Johnson	Open JCO'M - Panel G JJG
82 CI 21202	Eddie R. Jackson, Sr.	AC 9/28/82
82 CI 21618	Earl Davis	Open JCO'M
82 CI 21713	Mary M. Nolen	Open JCO'M
83 CI 2117	Galvesto Dean	Open JJG
83 CI 2448	Edward Greenhill	Open JJG

Appendix Two

SUBPOENA DUCES TECUM—Supreme Court of Illinois—Before Administrator — Form 35

No. 83 CI 2510

STATE OF ILLINOIS, } ss.
SUPREME COURT

THE PEOPLE OF THE STATE OF ILLINOIS

TO Berry & Gore, Ltd.
205 West Wacker Drive - #2200
Chicago, Illinois 60606 GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before the Administrator of the Attorney Disciplinary System on May 13, 1983, at 2:00 o'clock P.M. at Suite 1900, 203 N. Wabash Ave., in the City of Chicago, County of Cook, to testify and give evidence and the truth to speak in a certain investigation now being conducted by said Administrator relating to Attorney Berry & Gore, Ltd.

And that you also diligently and carefully search for, examine and inquire after and bring with you and produce at the time and place aforesaid all employment records and records of payment, whether salary, commission or otherwise, by the firm to either Arthur Reuter or Vincent Luisi from January 1, 1978 to the present. (OVER

together with all copies, drafts and vouchers relating to the said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said investigation. And this you shall in no wise omit under penalty of the law.

WITNESS, JULEANN HORNYAK, Clerk of our said Court, and the Seal thereof at Springfield, Illinois, this 13th day of April, 1983

Juleann Hornyak Clerk.

No. 83 CI 2510

ATTORNEY DISCIPLINARY SYSTEM
OF THE
SUPREME COURT OF ILLINOIS

In the Matter of Berry & Gore, Ltd.

Subpoena

JULEANN HORNYAK
Clerk of the Supreme Court of Illinois

Include all original canceled checks reflecting payment to either Reuter or Luisi for any reason;

All lists, ledgers, records or documents of any kind reflecting the name or names of any person or persons to whom money has been paid for referral of potential clients from January 1, 1978 to the present. Specifically to be included is any record of money paid to any such person, and if paid by check, all original cancelled checks reflecting such payment;

All lists, ledgers, records or documents of any kind reflecting the name or names of any and all physicians, health practitioners and or health treatment facilities to whom the firm has referred ten or more clients since January 1, 1978 to the present; and

All original monthly bank statements and all original canceled checks for any account maintained by the firm into which claim settlement drafts, client funds or client related funds have been deposited from January 1, 1978 to the present;

Appendix Three

IN THE SUPREME COURT OF ILLINOIS

In the Matter of:	)	
	)	
BRUCE S. BERRY and RICHARD S. GORE,	)	No. M.R. 3093
	)	
Attorney-Respondents.	)	

R E S P O N S E

Carl H. Rolewick, by his attorney John C. O'Malley, responds to the Motion to Quash Subpoena Duces Tecum filed in this matter and states:

BACKGROUND

The law firm of Berry and Gore, Ltd. has from time to time been the subject of complaints filed with the Attorney Registration and Disciplinary Commission by clients or other persons.

In connection with matters pending against them, attorneys Berry and Gore previously moved on December 23, 1980 to quash a subpoena duces tecum served upon them by the Commission. (Sup. Ct. No. M.R. 2588.) Consideration of the motion by the Court was deferred pending disposition of similar issues in the case of In re Zisook, et al, 88 Ill. 2d 321, 430 N.E. 2d 1037 (1981), (cert. denied, ___ U.S. ___ , (1982).)

On October 4, 1982 the motion in case number M.R. 2588 was denied.

After denial of Respondents' motion in case number M.R. 2588, correspondence and conversation ensued between the Administrator and Respondents' attorneys. The parties sought to determine what

matters remained at issue and/or what new issues may have been raised as the result of the passage of time occasioned by the Court's consideration of In re Zisook, et al, 88 Ill.2d 321, 430 N.E.2d 1037 (1981).

THE INSTANT SUBPOENA

As a result of the above, the Administrator reviewed all matters involving Respondents and by letter dated April 13, 1983 sought to delineate the present scope of the Administrator's investigation. A copy of the Administrator's April 13, 1983 letter with enclosure is attached as Administrator's Exhibit One. The subpoena at issue in this matter was also enclosed with the Administrator's April 13, 1983 letter and is attached as Exhibit Two. Return of the subpoena was continued by agreement to afford Respondents time to prepare the instant motion.

The April 13, 1983 subpoena requests production of documents in four areas:

- employment records for two employees of the firm of Berry and Gore, Ltd.;
- all records regarding payment of money for referral of clients;
- records relating to physicians and/or treatment facilities to whom Respondents have referred ten or more clients; and
- all bank statements and cancelled checks for any account in which client funds are deposited.

The records requested are limited to the period January 1, 1978 to the present.

GROUNDS FOR MOTION

Respondents request that the subpoena at issue in this matter be quashed on the following grounds:

- the subpoena requires the production of voluminous documents where no pending complaint involves the requested information and no reasonable cause exists;

- the subpoena is unreasonable and overbroad in violation of the Fourth and Fourteenth Amendments to the United States Constitution and constitutes a "fishing expedition;" and

- the Administrator has exceeded the scope of the investigatory authority granted to him by the Court and Commission. (Motion to Quash Subpoena Duces Tecum, par. 3.)

QUESTION PRESENTED

Whether the April 13, 1983 subpoena compels the production of documents which are reasonably related to a lawfully authorized inquiry.

RESPONSE TO MOTION

I. MATTERS PENDING

1. Pursuant to the directives of Rule 753 and Commission Rule 1.1, the Administrator has instituted investigations involving Respondents in approximately seventy-three matters as of April 13, 1983. (See Exhibit One.)

2. Prior to April 13, 1983 the Administrator and the Inquiry Board considered each matter individually. As reflected by Commission records many matters have been dismissed and certain files remain pending. (Exhibit One.) On April 13, 1983 the Administra-

tor initiated file number 83 CI 2510. File number 83-CI-2510 constitutes the Administrator's generalized investigation of the firm as compelled by the directives of Rule 753 and Commission Rule 1.1.

3. By his letter of April 13, 1983, the Administrator advised Respondents of the basis and scope of the investigation encompassed by file 83-CI-2510. In addition, the Administrator requested additional information regarding other pending matters.

II. THEORY OF INVESTIGATION

1. Respondents are principals in a firm which handles a large volume of personal injury and property damage claims.

2. Information contained in pending files suggests that the firm may engage in the following acts of professional misconduct as specified in the Administrator's April 13, 1983 letter:

(a) solicitation of professional business;

(b) aiding the unauthorized practice of law;

(c) maintenance of unwarranted or spurious claims; and

(d) improper handling of client funds.

3. The Administrator is particularly concerned that Respondents or their agents may engage in the practice of issuing multiple checks constituting the net proceeds due a client upon distribution of a claim. In such cases, under circumstances intended to confuse the client, one check is given to the client while the second check, reflecting the balance owing the client, will be retained by the attorney. The second check is then later negotiated by the attorney

for cash. This practice, which is known as "chopping" the client, is a means whereby corrupt attorneys generate cash to be used either for personal purposes or for the purpose of paying for cases referred by a "chaser."

III. FACTS GIVING RISE TO SUBPOENA

1. As stated in the Administrator's April 13, 1983 letter, probable cause for the issuance of the subpoena in this matter emanates, at least in part, from information derived from the Administrator's review of the many complaints filed against Respondents over the years, as corroborated by specific instances related below.

2. On March 3, 1982 Carol A. Maher gave a sworn statement. Ms. Maher, a former employee of the firm of Berry and Gore, Ltd., described the general practices of the firm which include:

- solicitation of legal business through the payment of "chasers" for cases;
- employment of non-attorneys for the purpose of advising clients and handling files;
- regular and systematic referral of clients by non-attorney employees to certain physicians or treatment facilities;
- unauthorized endorsement of releases and drafts;
- failure to pay doctors or other persons to whom money is owed upon settlement of claims;
- overdraft of firm accounts in which client funds are handled; and
- circumstances suggesting the issuance of multiple settlement drafts.

A copy of the March 3, 1982 sworn statement of Carol A. Maher is attached as Exhibit Three.

3. On June 25, 1979 the personal injury claim of Edgar Sherard was settled and distribution effected. A statement of settlement was prepared on that date reflecting that money was withheld for the payment of doctors. The Administrator's investigations disclosed that the doctors were not paid until September 23, 1980, after inquiry was instituted. Copies of the June 25, 1979 Statement of Settlement and the September 23, 1980 letter from William J. Martin, with relevant enclosures, is attached as Group Exhibit Four.

4. On October 30, 1980 Attorney Angelo W. Karsas, on behalf of Fred Lenczewski, alleged unauthorized endorsement and possible conversion of funds by Respondents in connection with an October 1978 settlement of a personal injury case for $23,000.00. Respondents have declined to respond for the reason that civil litigation is pending against them arising from the Lenczewski settlement. A copy of the October 30, 1980 letter from Angelo W. Karsas with enclosures is attached as Exhibit Five.

5. On June 9, 1980 William R. Benson, III, M.D. filed a complaint with the Administrator alleging nonpayment by Respondents for services rendered in connection with a case that had been settled. Respondents answered on September 16, 1980 enclosing a copy of a March 3, 1980 Statement of Settlement reflecting that money was withheld for payment of doctors. Respondents' answer reveals that the

doctors involved were not paid until July 14, 1980 after the inquiry was instituted. A copy of the September 16, 1980 response with relevant enclosures, including the March 3, 1980 Statement of Settlement, is attached as Exhibit Six.

6. On December 22, 1980 Dr. Stephen J. Curry filed a complaint with the Administrator alleging non-payment for services rendered in connection with a case that had been settled. On April 1, 1981 respondents answered enclosing evidence of payment to Doctor Curry on March 25, 1981 after inquiry was instituted. Respondents allege that no money was withheld from the settlement for payment and enclose a copy of a November 1980 letter apparently supporting that assertion. Respondents state no statement of settlement is available. Copies of the December 22, 1980 complaint of Dr. Curry, the April 1, 1981 letter from Respondents' attorney with enclosures, and the May 4, 1983 letter from Respondents' attorneys are attached as Group Exhibit Seven.

7. On August 25, 1982 the personal injury claim of Earl Davis was settled and distribution effectuated. On that date Davis apparently signed a Statement of Settlement reflecting net disbursement to Davis in the amount of $33,473 and endorsed two Berry and Gore, Ltd. checks payable to Davis in the amount of $29,000 and $4,473, respectively. On June 2, 1983 Davis gave a sworn statement wherein he indicated that the Statement of Settlement and checks were signed by him under circumstances of confusion and that he received only $29,000 in settlement of his claim. Investigation

confirms that the $29,000 check was negotiated by Davis at his own bank and the $4,473 check was negotiated for cash at Respondents' bank under the authority of Respondent Berry. Copies of the August 25, 1982 Statement of Settlement and checks issued in connection therewith are attached as Group Exhibit Eight. A copy of the June 2, 1983 sworn statement of Earl Davis is attached as Exhibit Nine.

8. In connection with the matter referred to in paragraph 7 above, the Administrator obtained the sworn statement of Deborah Sparkman, the bank teller who negotiated the $4,473 check. Ms. Sparkman, an employee of the American National Bank and Trust Co. in Chicago where Respondents bank, indicated that she regularly negotiated third party checks drawn on Berry and Gore's account for Respondents Berry and Gore and for Respondent Berry's father. Ms. Sparkman further indicated that often several such checks were presented at one time for cashing and that to her knowledge clients were never present. A copy of the June 23, 1983 sworn statement of Deborah Sparkman is attached as Exhibit Ten.

9. On January 7, 1981 Felanthus Davis filed a complaint against Respondents. Mr. Davis' complaint indicated that after being involved in an accident he was approached by a man who came to his home and referred him to the firm of Berry and Gore, Ltd. The Administrator's investigation has identified the man referred to as Richard Flemming. Upon inquiry, Respondents advised that Richard Flemming is a former client of Berry and Gore, Ltd. who was not paid

for referring Mr. Davis to the firm. Further investigation has revealed that if Mr. Davis is a former client of Respondents, he also appears to be in the business of soliciting personal injury cases. A copy of the January 7, 1981 complaint of Felanthus Davis is attached as Exhibit Eleven. A copy of the May 12, 1983 letter from Respondents' attorneys is attached as Exhibit Twelve. Copies of Richard J. Flemming's business card and relevant telephone messages taken for Flemming by Rogers Radio Communication Services, Inc., which indicate the nature of Flemming's business, are attached as Group Exhibit Thirteen.

10. On July 24, 1980 the Administrator requested that Respondents reply to allegations made in connection with the Chicago Sun Times/WLS Television investigation, The Accident Swindlers. The investigation essentially revealed that reporters posing as accident victims met with non-attorney employees of Berry and Gore, Ltd. who coached them regarding feigned injuries. As of the present date, Respondents have declined to respond. Copies of the Administrator's July 24, 1980 letter and the May 4, 1983 letter from Respondents' attorneys with enclosures is attached as Group Exhibit Fourteen.

IV. ARGUMENT

Respondents argue that the April 13, 1983 subpoena was issued without "probable cause." It is difficult to quantify the basis for a subpoena. This Court has recognized ". . . neither the commissioners nor this Court are required to be naive or impractical

in appraising an attorney's conduct." In re Krasner, 32 Ill. 2d 121, 127, 204 N.E.2d 10, 13 (1965). Certainly such a recognition, based on experience, plays a legitimate part in determining the course of an investigation.

Nevertheless, the Administrator has attached significant information to this pleading which initiated or corroborated each concern enunciated in the Administrator's April 13, 1983 letter. The subpoena issued in support of the letter is specific, limited, and seeks only that information necessary to support or negate the Administrator's charges.[1]

Supreme Court Rule 752 provides, in pertinent part:

> Subject to the supervision of the Commission, the Administrator shall:
>
> (a) On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate conduct of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute; . . . Ill. Rev. Stat. ch. 110A, §752 (1975).

To aid the Administrator in the performance of his duty, the Court enacted Supreme Court Rule 754 which provides, in pertinent part:

> Upon request of the Administrator. . . the Clerk of the Court shall issue subpoenas for the appearance of witnesses and subpoenas to require the production of books, records, papers and other items relevant to the matters under investigation or to pending cases. Ill. Rev. Stat. ch. 110A, §754 (1975).

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[1]For example, the Administrator has requested that Respondents identify only physicians and health care facilities to whom Respondents have referred ten or more clients. Further, the Administrator seeks information regarding only those accounts into which client funds are deposited rather than requesting all books, ledgers, and accounts, etc. (See Exhibit Two.)

An attorney whose conduct is questioned must appear and submit for examination whatever records are in his possession relevant to the inquiry. In re Royal, 29 Ill. 2d 458, 460, 194 N.E.2d 24 243 (1963). The Administrator's authority to compel production of documents pursuant to subpoena has been affirmed. In re Zisook, et al, supra.

Decisions by this Court upholding grand jury subpoenas compel the conclusion that the subpoena at issue in this case is appropriate. A subpoena duces tecum will be upheld even if it requires the production of a large amount of documents, as long as the subpoena is not unreasonably broad or irrelevant. People v. Allen, 410 Ill. 508, 103 N.E.2d 92 (1951). In that case this Court stated that it was obvious that no absolute rule could be laid down either as to the number of books and records which could be compelled to be produced or as to the time period which they could cover. The reasonable scope of an investigation depends upon what is being investigated. Id. at 514, 103 N.E.2d at 95.

Further, it is not necessary that a "cause" or a "specific charge" be pending before a grand jury as a condition of its right to command the production of documents. People v. Allen, supra; People v. Dorr, 47 Ill.2d 458, 265 N.E.2d 601 (1971). The very purpose of a grand jury inquiry is to uncover matters previously unknown. People v. Dorr, 47 Ill.2d at 462, 103 N.E.2d at 603. Grand jury investigations seeking to ascertain violations must be given the broadest scope possible, consistent with constitutional limitations. Id.

The United States Supreme Court has considered the constitutional implications raised by Respondents. In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), the Supreme Court considered the right of the Administrator of the Wage and Hour Division of the Department of Labor to judicial enforcement of a subpoena issued by him in connection with investigations conducted in accordance with the Fair Labor Standards Act. The Supreme Court considered the question of whether enforcement of a subpoena would violate rights secured by the Fourth Amendment. The petitioners therein claimed that the wage Administrator sought to conduct general "fishing expeditions" into books, records and papers in order to secure evidence without a prior charge or complaint.

The Court held that the Fourth Amendment guards against abuse of the subpoena power only by way of too much indefiniteness or breadth in the things required to be produced. The gist of the Fourth Amendment protection is that the disclosure shall not be unreasonable. Id. at 208. The requirement of probable cause is satisfied when the subpoena is issued by a body which has lawful authority to investigate and the subpoena is issued for a lawfully recognized purpose. Also, the documents sought must be relevant to the inquiry. Id. at 209. Reasonableness requires that the documents requested must be adequate, but not excessive, for the purposes of the relevant inquiry. Reasonableness cannot be reduced to a formula. What is relevant or excessive in breadth is variable in relation to the nature, purposes and scope of the inquiry. Id.

The Court further reasoned that if the petitioners' Fourth Amendment arguments were accepted, much, if not all, investigations in the public interest would stop at the threshold of inquiry. This would make any powers or duties of investigation impossible. Id. at 213.

In United States v. Morton Salt Co., 338 U.S. 632 (1950) the Federal Trade Commission ordered the Morton Salt Company to produce certain papers, documents and books to show compliance with a prior cease and desist order. The company refused to comply on the grounds that the Commission did not have the authority to require them to produce such documents and that the order to do so violated the Fourth Amendment. The company argued that since the Commission made no charge of a violation of the cease and desist order, it was engaged in a mere "fishing expedition" to see if it could turn up evidence of guilt. Id. at 641.

The Supreme Court stated that the FTC, like other commissions, has power similar to that of a grand jury. It does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that a law is being violated, or even because it wants assurance that it is not. When investigative and accusatory duties are delegated to an administrative body, it may take steps to inform itself whether there is a probable violation of the law. Id. at 642, 643.

Respondents herein refer to several cases in which subpoenas have not been upheld. In these cases, the subpoenas at issue were unreasonably broad in their demands and general in their terms.

In People v. Keefe, 36 Ill.2d 460, 233 N.E.2d 144 (1967), the description of the documents requested in the subpoena was so insufficient that the respondents could not determine what was to be produced. In People v. Lurie, 39 Ill.2d 331, 235 N.E.2d 637 (1968), another case which the respondents cite, the Supreme Court held that a subpoena which demanded that a corporation produce its general ledger, accounts receivable and accounts payable, cash receipts and disbursements journals, payroll ledger, bank statements and cancelled checks was unreasonably broad. The documents provided only a tenuous relationship to the investigation being conducted.

In this case, the information sought is specific and limited and relates to information and allegations in the Administrator's possession which compel resolution.

CONCLUSION

The information in the Administrator's possession is suggestive of substantial misconduct. If such is the case, the interests of the Court, the profession, and the public require that formal charges be brought. If such is not the case, respondents are entitled to be exonerated. In either case, the information sought is necessary in order that the question be resolved. If the Administrator is not allowed to go forward in matters such as these, effective disciplinary enforcement is impossible.

Respectfully submitted,

John C. O'Malley,
Counsel for the Administrator

John C. O'Malley
Chief Counsel
Attorney Registration and
Disciplinary Commission
203 North Wabash Avenue - #1900
Chicago, Illinois 60601
Telephone: 312-346-0690

Office-Supreme Court, U.S.
FILED
DEC 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERRY AND GORE, LTD.,

Petitioner.

v.

ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

JOHN C. O'MALLEY
203 North Wabash Avenue
Suite 1900
Chicago, Illinois 60601
(312) 346-0690
Attorney for Respondent

James J. Grogan
Of Counsel

Merrill/Gunthorp Warren, Chicago • 372-2800

Appendix One

Chicago
April 13, 1983

Mr. William J. Martin
William J. Martin, Ltd.
33 North Dearborn Street - #930
Chicago, Illinois 60602

Dear Mr. Martin:

This letter is in furtherance of our conversation of March 3, 1983, and will delineate the scope of the Administrator's investigation of the law firm of Berry & Gore, Ltd. The Administrator's investigation has been stayed pending disposition of case M.R. 2588 in the Supreme Court of Illinois and, as to certain matters, at the request of the firm due to the pendency of a federal grand jury investigation. The Supreme Court denied the motion to quash subpoena in case M.R. 2588 on October 4, 1982 and the Administrator has not been advised that the grand jury investigation is continuing. The Administrator has determined that there is no impediment to the investigation going forward at this time.

BACKGROUND

The records of the Commission reveal that inquiries have been instituted against the firm or its employees in forty-one matters since January 1, 1978, the date the Commission's records were computerized. Manual records indicate that prior to 1978 thirty-two additional matters were considered. A copy of a listing of the forty-one matters referred to above,

reflecting the date of disposition or present status, is attached.

We have reviewed all matters relating to the firm and conclude:

- certain pending matters are ready for consideration and may be submitted to the Inquiry Board for decision without further delay;
- additional information is required as to certain pending matters; and
- the general practices of the firm, as revealed by all matters, warrant investigation. Such investigation will be conducted under the auspices of file number 83-CI-2510, a new matter.

PENDING MATTERS

Further information required in connection with pending matters is as follows:

80-CI-2217 atc The Administrator — File No. 80-CI-2217 arises from disclosures or allegations in the Chicago Sun Times (*The Accident Swindlers*). Messrs. Berry and Gore have not responded to the Administrator's letter of July 24, 1980; rather they have asserted the privilege against self-incrimination. The Administrator believes that the federal grand jury investigation in the matter has concluded without recommendation of formal action and the Administrator calls upon the firm to respond at this time;

80-CI- 21513 atc Fred Lenczewski — The firm requested a stay of the Administrator's investigation pending disposition of related civil litigation. Please relate the status of the litigation.

80-CI-21775 atc Stephen Curry, M.D. — The matter arises from a physician's allegation that he was not paid for services rendered from the proceeds of a settlement. Please forward a copy of the settlement distribution sheet reflecting disbursement in the matter at issue;

80-CI-2013 atc Felanthus Davis — Please identify Richard Flemming and describe his relationship with the firm. Specifically, state whether Flemming referred Davis to the firm and, if so, whether Flemming was paid for the referral;

82-CI-2211 atc Aristidis Tousis — Please describe the relationship of Alan M. Katz with the firm at any time; describe the nature of any agreement for referral of cases by the firm to Katz; and list all such referrals and account for any and all money paid to Katz by the firm, whether such payment is in the nature of fees or constitutes payment or reimbursement for staff or office;

82-CI-21618 atc Earl Davis — The Administrator inadvertently failed to forward the Davis complaint to the firm following the Supreme Court's disposition of case M.R. 2588. A copy of the complaint will be forwarded under separate cover;

82-CI-21713 atc Mary M. Nolen — Same as 82-CI-21618 above; and

83-CI-2493 atc Lolita Johnson — Ms. Johnson's complaint was received April 4, 1982 and will be forwarded under separate cover.

A review of all matters instituted against the firm, the information contained therein and the Administration's general investigation indicates that the firm's practices in several areas may amount to unethical conduct by attorneys employed by the firm. Those practices are:

- *Solicitation of professional employment*

The firm appears to be engaged in the systematic solicitation of legal employment. This practice includes payment to third persons for the referral of prospective clients to the firm;

- *Aiding the unauthorized practice of law*

The firm appears to employ persons who are not attorneys for the purpose of advising clients and negotiating and settling client claims;

- *Maintenance of unwarranted or spurious claims*

The firm appears to be engaged in the regular practice of referring clients to certain physicians, health practitioners and health treatment facilities for the purpose of generating apparently compensable expenses; and

- *Improper handling of client funds*

The firm may not properly account for funds generated by client claims. This includes the failure to preserve the identity of client funds and to promptly and/or fully account to the client for the handling of funds. The firm may delay transmitting or fail to transmit funds to third persons pursuant to settlement distribution agreements.

REQUEST FOR INFORMATION

The Administrator intends to take the statements of Bruce Berry and Richard Gore, as well as other employees of the firm. Prior to doing so, it will be necessary for the Administrator to obtain certain information from the firm. Please provide:

- All employment records and records of payment, whether salary, commission or otherwise, by the firm to either Arthur Reuter or Vincent Luisi from January 1, 1978 to the present. Include all original cancelled checks reflecting any payment to either Reuter or Luisi for any reason;

- A listing of all persons, including addresses, to whom money has been paid for referral of potential clients for the period January 1, 1978 to the present. Include an accounting of amounts paid and, if paid by check, copies of all original cancelled checks reflecting any such payment;

- A listing of all physicians, health practitioners and health treatment facilities, with addresses, to whom the firm has referred ten or more clients since January 1, 1978 to the present; and

- Original monthly bank statements and all cancelled checks for any account maintained by the firm into which settlement drafts, client funds, or client related funds have been deposited from January 1, 1978 to the present.

In order that the matter may go forward without delay, I am enclosing a subpoena duces tecum compelling the production of the information referred to above on or before May 13, 1983.

If you have any questions, please let me know.

Very truly yours,

John C. O'Malley

JCO' M :ms
Encs.

BRUCE S. BERRY AND RICHARD S. GORE

INQUIRY FILES

File Number	Complaining Witness	Status
78 CI 2215	Lucille Constant	AD 1/05/79
79 CI 2883	Thomas Augustyn	AD 12/19/79
79 CI 2884	Lillie M. Shine	PD 2/05/80
79 CI 2899	Edgar L. Sherard, Jr.	Open JCO'M - Panel G
79 CI 2916	Diana M. Howerton	AD 11/06/79
79 CI 21024	Jack W. Byans Aine M. Byans	AD 6/05/80
80 CI 2216	Carl H. Rolewick	AC 9/23/80
80 CI 2217	Carl H. Rolewick	Open JCO'M - Panel G
80 CI 2246	Lupe Giralamo	AD 6/05/80
80 CI 2332	Kristen Baier	Open JL - Panel G
80 CI 2361	Darnell Williams	Open JL
80 CI 2382	Earnesti Lanier	AD 7/10/80
80 CI 2414	Vergie Williams	AD 11/06/80
80 CI 2441	Sandra P. Burson	Open JL - Panel G
80 CI 2539	Alvin Winograd	AD 9/17/80
80 CI 2567	Jessie Moss	Open JCO'M - Panel G
80 CI 2677	Rosa Burgos	Open JL
80 CI 2888	William Benson III	Open JCO'M - Panel G
80 CI 21406	Joann Darden	AD 12/09/80
80 CI 21414	Jose D'Avila	Open JCO'M
80 CI 21466	James Moore	Open JCO'M - Panel G JJG
80 CI 21513	Angelo Karras Fred Lenczewski	Open JCO'M
80 CI 21775	Stephen Curry, M.D.	Open JCO'M - Panel G

File Number	Complaining Witness	Status
81 CI 2013	Felanthu Davis	Open JCO'M - Panel G
81 CI 2247	Walter Borom Willie Spencer	Open JCO'M
81 CI 2428	Bobby R. Chumley Ardell Holland Frank Lewis	Open JCO'M
81 CI 2958	Sheila Jackson	AD 9/29/81
81 CI 21211	George S. Butler Cheryl C. Taylor	AD 2/11/82
82 CI 2211	Aristidi Tousis	Open JCO'M - Panel G
82 CI 2441	William Johnson	Open JCO'M - Panel G JJG
82 CI 21202	Eddie R. Jackson, Sr.	AC 9/28/82
82 CI 21618	Earl Davis	Open JCO'M
82 CI 21713	Mary M. Nolen	Open JCO'M
83 CI 2117	Galvesto Dean	Open JJG
83 CI 2448	Edward Greenhill	Open JJG

Appendix Two

SUBPOENA DUCES TECUM—Supreme Court of Illinois—Before Administrator — Form 35

No. 83 CI 2510

STATE OF ILLINOIS,

ss.

SUPREME COURT

THE PEOPLE OF THE STATE OF ILLINOIS

TO Berry & Gore, Ltd.
205 West Wacker Drive - #2200
Chicago, Illinois 60606 GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before the Administrator of the Attorney Disciplinary System on May 13, 1983, at 2:00 o'clock P.M. at Suite 1900, 203 N. Wabash Ave., in the City of Chicago, County of Cook, to testify and give evidence and the truth to speak in a certain investigation now being conducted by said Administrator relating to Attorney Berry & Gore, Ltd.

And that you also diligently and carefully search for, examine and inquire after and bring with you and produce at the time and place aforesaid all employment records and records of payment, whether salary, commission or otherwise, by the firm to either Arthur Reuter or Vincent Luisi from January 1, 1978 to the present. Include all original canceled checks reflecting payment to either Reuter or Luisi for any reason;

All lists, ledgers, records or documents of any kind reflecting the name or names of any person or persons to whom money has been paid for referral of potential clients from January 1, 1978 to the present. Specifically to be included is any record of money paid to any such person, and if paid by check, all original cancelled checks reflecting such payment;

All lists, ledgers, records or documents of any kind reflecting the name or names of any and all physicians, health practitioners and/or health treatment facilities to whom the firm has referred ten or more clients since January 1, 1978 to the present; and

All original monthly bank statements and all original canceled checks for any account maintained by the firm into which claim settlement drafts, client funds or client related funds have been deposited from January 1, 1978 to the present;

together with all copies, drafts and vouchers relating to the said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said investigation. And this you shall in no wise omit under penalty of the law.

WITNESS, JULEANN HORNYAK, Clerk of our said Court, and the Seal

thereof at Springfield, Illinois, this 13th day of April, 1983

.....Clerk.

Appendix Three

No. M.R. 3093

IN THE

Supreme Court Of Illinois

IN THE MATTER OF:

BRUCE S. BERRY AND RICHARD S. GORE,

Attorney-Respondents.

RESPONSE

Carl H. Rolewick, by his attorney John C. O'Malley, responds to the *Motion to Quash Subpoena Duces Tecum* filed in this matter and states:

BACKGROUND

The law firm of Berry and Gore, Ltd. has from time to time been the subject of complaints filed with the Attorney Registration and Disciplinary Commission by clients or other persons.

In connection with matters pending against them, attorneys Berry and Gore previously moved on December 23, 1980 to quash a subpoena duces tecum served upon them by the Commission. (Sup. Ct. No. M.R. 2588.) Consideration of the motion by the Court was deferred pending disposition of similar issues in the case of *In re Zisook, et al*, 88 Ill.2d 321, 430 N.E.2d 1037 (1981), (cert. denied, ___ U.S. ___, (1982).)

On October 4, 1982 the motion in case number M.R. 2588 was denied.

After denial of Respondents' motion in case number M.R. 2588, correspondence and conversation ensued between the Administrator and Respondents' attorneys. The parties sought to determine what matter remained at issue and/or what new issues may have been raised as the result of the

passage of time occasioned by the Court's consideration of *In re Zisook, et al*, 88 Ill.2d 321, 430 N.E.2d 1037 (1981).

THE INSTANT SUBPOENA

As a result of the above, the Administrator reviewed all matters involving Respondents and by letter dated April 13, 1983 sought to delineate the present scope of the Administrator's investigation. A copy of the Administrator's April 13, 1983 letter with enclosure is attached as Adminstrator's Exhibit One. The subpoena at issue in this matter was also enclosed with the Adminstrator's April 13, 1983 letter and is attached as Exhibit Two. Return of the subpoena was continued by agreement to afford Respondents time to prepare the instant motion.

The April 13, 1983 subpoena requests production of documents in four areas:

— employment records for two employees of the firm of Berry and Gore, Ltd.;

— all records regarding payment of money for referral of clients;

— records relating to physicians and/or treatment facilities to whom Respondents have referred ten or more clients; and

— all bank statements and cancelled checks for any account in which client funds are deposited.

The records requested are limited to the period January 1, 1978 to the present.

GROUNDS FOR MOTION

Respondents request that the subpoena at issue in this matter be quashed on the following grounds:

— the subpoena requires the production of voluminous documents where no pending complaint involves the requested information and no reasonable cause exists;

— the subpoena is unreasonable and overbroad in violation of the Fourth and Fourteenth Amendments to the United States Constitution and constitutes a "fishing expedition;" and

— the Administrator has exceeded the scope of the investigatory authority granted to him by the Court and Commission. (*Motion to Quash Subpoena Duces Tecum*, par. 3.)

QUESTION PRESENTED

Whether the April 13, 1983 subpoena compels the production of documents which are reasonably related to a lawfully authorized inquiry.

RESPONSE TO MOTION

I. MATTERS PENDING

1. Pursuant to the directives of Rule 753 and Commission Rule 1.1, the Administrator has instituted investigations involving Respondents in approximately seventy-three matters as of April 13, 1983. (See Exhibit One.)

2. Prior to April 13, 1983 the Administrator and the Inquiry Board considered each matter individually. As reflected by Commission records many matters have been dismissed and certain files remain pending. (Exhibit One.) On April 13, 1983 the Administrator initiated file number 83 CI 2510. File number 83-CI-2510 constitutes the Administrator's generalized investigation of the firm as compelled by the directives of Rule 753 and Commission Rule 1.1.

3. By his letter of April 13, 1983, the Administrator advised Respondents of the basis and scope of the investigation encompassed by file 83-CI-2510. In addition, the Administrator requested additional information regarding other pending matters.

II. THEORY OF INVESTIGATION

1. Respondents are principals in a firm which handles a large volume of personal injury and property damage claims.

2. Information contained in pending files suggests that the firm may engage in the following acts of professional misconduct as specified in the Administrator's April 13, 1983 letter:

(a) solicitation of professional business;

(b) aiding the unauthorized practice of law;

(c) maintenance of unwarranted or spurious claims; and

(d) improper handling of client funds.

3. The Administrator is particularly concerned that Respondents or their agents may engage in the practice of issuing multiple checks constituting the net proceeds due a client upon distribution of a claim. In such cases, under circumstances intended to confuse the client, one check is given to the client while the second check, reflecting the balance owing the client, will be retained by the attorney. The second check is then later negotiated by the attorney for cash. This practice, which is known as "chopping" the client, is a means whereby corrupt attorneys generate cash to be used either for personal purposes or for the purpose of paying for cases referred by a "chaser."

III. FACTS GIVING RISE TO SUBPOENA

1. As stated in the Administrator's April 13, 1983 letter, probable cause for the issuance of the subpoena in this matter emanates, at least in part, from information derived from the

Administrator's review of the many complaints filed against Respondents over the years, as corroborated by specific instances related below.

2. On March 3, 1982 Carol A. Maher gave a sworn statement. Ms. Maher, a former employee of the firm of Berry and Gore, Ltd., described the general practices of the firm which include:

— solicitation of legal business through the payment of "chasers" for cases;

— employment of non-attorneys for the purpose of advising clients and handling files;

— regular and systematic referral of clients by non-attorney employees to certain physicians or treatment facilities;

— unauthorized endorsement of releases and drafts;

— failure to pay doctors or other persons to whom money is owed upon settlement of claims;

— overdraft of firm accounts in which client funds are handled; and

— circumstances suggesting the issuance of multiple settlement drafts.

A copy of the March 3, 1982 sworn statement of Carol A. Maher is attached as Exhibit Three.

3. On June 25, 1979 the personal injury claim of Edgar Sherard was settled and distribution effected. A statement of settlement was prepared on that date reflecting that money was withheld for the payment of doctors. The Administrator's investigations disclosed that the doctors were not paid until September 23, 1980, after inquiry was instituted. Copies of the June 25, 1979 Statement of Settlement and the September 23, 1980 letter from William J. Martin, with relevant enclosures, is attached as Group Exhibit Four.

4. On October 30, 1980 Attorney Angelo W. Karsas, on behalf of Fred Lenczewski, alleged unauthorized endorsement and possible conversion of funds by Respondents in connection with an October 1978 settlement of a personal injury case for $23,000.00. Respondents have declined to respond for the reason that civil litigation is pending against them arising from the Lenczewski settlement. A copy of the October 30, 1980 letter from Angelo W. Karsas with enclosures is attached as Exhibit Five.

5. On June 9, 1980 William R. Benson, III, M.D. filed a complaint with the Administrator alleging nonpayment by Respondents for services rendered in connection with a case that had been settled. Respondents answered on September 16, 1980 enclosing a copy of a March 3, 1980 Statement of Settlement reflecting that money was withheld for payment of doctors. Respondents' answer reveals that the doctors involved were not paid until July 14, 1980 after the inquiry was instituted. A copy of the September 16, 1980 response with relevant enclosures, including the March 3, 1980 Statement of Settlement, is attached as Exhibit Six.

6. On December 22, 1980 Dr. Stephen J. Curry filed a complaint with the Administrator alleging non-payment for services rendered in connection with a case that had been settled. On April 1, 1981 respondents answered enclosing evidence of payment to Doctor Curry on March 25, 1981 after inquiry was instituted. Respondents allege that no money was withheld from the settlement for payment and enclose a copy of a November 1980 letter apparently supporting that assertion. Respondents state no statement of settlement is available. Copies of the December 22, 1980 complaint of Dr. Curry, the April 1, 1981 letter from Respondents' attorney with enclosures, and the May 4, 1983 letter from Respondents' attorneys are attached as Group Exhibit Seven.

7. On August 25, 1982 the personal injury claim of Earl Davis was settled and distribution effectuated. On that date Davis apparently signed a Statement of Settlement reflecting net disbursement to Davis in the amount of $33,473 and

endorsed two Berry and Gore, Ltd. checks payable to Davis in the amount of $29,000 and $4,473, respectively. On June 2, 1983 Davis gave a sworn statement wherein he indicated that the Statement of Settlement and checks were signed by him under circumstances of confusion and that he received only $29,000 in settlement of his claim. Investigation confirms that the $29,000 check was negotiated by Davis at his own bank and the $4,473 check was negotiated for cash at Respondents' bank under the authority of Respondent Berry. Copies of the August 25, 1982 Statement of Settlement and checks issued in connection therewith are attached as Group Exhibit Eight. A copy of the June 2, 1983 sworn statement of Earl Davis is attached as Exhibit Nine.

8. In connection with the matter referred to in paragraph 7 above, the Administrator obtained the sworn statement of Deborah Sparkman, the bank teller who negotiated the $4,473 check. Ms. Sparkman, an employee of the American National Bank and Trust Co. in Chicago where Respondents bank, indicated that she regularly negotiated third party checks drawn on Berry and Gore's account for Respondents Berry and Gore and for Respondent Berry's father. Ms. Sparkman further indicated that often several such checks were presented at one time for cashing and that to her knowledge clients were never present. A copy of the June 23, 1983 sworn statement of Deborah Sparkman is attached as Exhibit Ten.

9. On January 7, 1981 Felanthus Davis filed a complaint against Respondents. Mr. Davis' complaint indicated that after being involved in an accident he was approached by a man who came to his home and referred him to the firm of Berry and Gore, Ltd. The Administrator's investigation has identified the man referred to as Richard Flemming. Upon inquiry, Respondents advised that Richard Flemming is a former client of Berry and Gore, Ltd. who was not paid for referring Mr. Davis to the firm. Further investigation has revealed that if Mr. Davis is a former client of Respondents, he also appears to be in the business of soliciting personal

injury cases. A copy of the January 7, 1981 complaint of Felanthus Davis is attached as Exhibit Eleven. A copy of the May 12, 1983 letter from Respondents' attorneys is attached as Exhibit Twelve. Copies of Richard J. Flemming's business card and relevant telephone messages taken for Flemming by Rogers Radio Communication Services, Inc., which indicate the nature of Flemming's business, are attached as Group Exhibit Thirteen.

10. On July 24, 1980 the Administrator requested that Respondents reply to allegations made in connection with the Chicago Sun Times/WLS Television investigation, *The Accident Swindlers*. The investigation essentially revealed that reporters posing as accident victims met with non-attorney employees of Berry and Gore, Ltd. who coached them regarding feigned injuries. As of the present date, Respondents have declined to respond. Copies of the Administrator's July 24, 1980 letter and the May 4, 1983 letter from Respondents' attorneys with enclosures is attached as Group Exhibit Fourteen.

IV. Argument

Respondents argue that the April 13, 1983 subpoena was issued without "probable cause." It is difficult to quantify the basis for a subpoena. This Court has recognized " . . . neither the commissioners nor this Court are required to be naive or impractical in appraising an attorney's conduct." *In re Krasner*, 32 Ill. 2d 121, 127, 204 N.E.2d 10, 13 (1965). Certainly such a recognition, based on experience, plays a legitimate part in determining the course of an investigation.

Nevertheless, the Administrator has attached significant information to this pleading which initiated or corroborated each concern enunciated in the Administrator's April 13, 1983 letter. The subpoena issued in support of the letter is

specific, limited, and seeks only that information necessary to support or negate the Administrator's charges.[1]

Supreme Court Rule 752 provides, in pertinent part:

> Subject to the supervision of the Commission, the Administrator shall:
>
> > (a) On his own motion, on the recommendation of an Inquiry Board or at the instance of an aggrieved party, investigate conduct of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute; . . . Ill. Rev. Stat. ch. 110A, §752 (1975).

To aid the Administrator in the performance of his duty, the Court enacted Supreme Court Rule 754 which provides, in pertinent part:

> Upon request of the Administrator . . . the Clerk of the Court shall issue subpoenas for the appearance of witnesses and subpoenas to require the production of books, records, papers and other items relevant to the matters under investigation or to pending cases. Ill. Rev. Stat. ch. 110A, §754 (1975).

An attorney whose conduct is questioned must appear and submit for examination whatever records are in his possession relevant to the inquiry. *In re Royal*, 29 Ill. 2d 458, 460, 194 N.E.2d 242, 243 (1963). The Administrator's authority to compel production of documents pursuant to subpoena has been affirmed. *In re Zisook, et al, supra.*

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1. For example, the Administrator has requested that Respondents identify only physicians and health care facilities to whom Respondents have referred ten or more clients. Further, the Administrator seeks information regarding only those accounts into which client funds are deposited rather than requesting all books, ledgers, and accounts, etc. (See Exhibit Two.)

Decisions by this Court upholding grand jury subpoenas compel the conclusion that the subpoena at issue in this case is appropriate. A subpoena duces tecum will be upheld even if it requires the production of a large amount of documents, as long as the subpoena is not unreasonably broad or irrelevant. *People* v. *Allen*, 410 Ill. 508, 103 N.E.2d 92 (1951). In that case this Court stated that it was obvious that no absolute rule could be laid down either as to the number of books and records which could be compelled to be produced or as to the time period which they could cover. The reasonable scope of an investigation depends upon what is being investigated. *Id.* at 514, 103 N.E.2d at 95.

Further, it is not necessary that a "cause" or a "specific charge" be pending before a grand jury as a condition of its right to command the production of documents. *People* v. *Allen*, supra; *People* v. *Dorr*, 47 Ill.2d 458, 265 N.E.2d 601 (1971). The very purpose of a grand jury inquiry is to uncover matters previously unknown. *People* v. *Dorr*, 47 Ill.2d at 462, 103 N.E.2d at 603. Grand jury investigations seeking to ascertain violations must be given the broadest scope possible, consistent with constitutional limitations. *Id.*

The United States Supreme Court has considered the constitutional implications raised by Respondents. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), the Supreme Court considered the right of the Administrator of the Wage and Hour Division of the Department of Labor to judicial enforcement of a subpoena issued by him in connection with investigations conducted in accordance with the Fair Labor Standards Act. The Supreme Court considered the question of whether enforcement of a subpoena would violate rights secured by the Fourth Amendment. The petitioners therein claimed that the wage Administrator sought to conduct general "fishing expeditions" into books, records and papers in order to secure evidence without a prior charge or complaint.

The Court held that the Fourth Amendment guards against abuse of the subpoena power only by way of too much

indefiniteness or breadth in the things required to be produced. The gist of the Fourth Amendment protection is that the disclosure shall not be unreasonable. *Id.* at 208. The requirement of probable cause is satisfied when the subpoena is issued by a body which has lawful authority to investigate and the subpoena is issued for a lawfully recognized purpose. Also, the documents sought must be relevant to the inquiry. *Id.* at 209. Reasonableness requires that the documents requested must be adequate, but not excessive, for the purposes of the relevant inquiry. Reasonableness cannot be reduced to a formula. What is relevant or excessive in breadth is variable in relation to the nature, purposes and scope of the inquiry. *Id.*

The Court further reasoned that if the petitioners' Fourth Amendment arguments were accepted, much, if not all, investigations in the public interest would stop at the threshold of inquiry. This would make any powers or duties of investigation impossible. *Id.* at 213.

In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950) the Federal Trade Commission ordered the Morton Salt Company to produce certain papers, documents and books to show compliance with a prior cease and desist order. The company refused to comply on the grounds that the Commission did not have the authority to require them to produce such documents and that the order to do so violated the Fourth Amendment. The company argued that since the Commission made no charge of a violation of the cease and desist order, it was engaged in a mere "fishing expedition" to see if it could turn up evidence of guilt. *Id.* at 641.

The Supreme Court stated that the FTC, like other commissions, has power similar to that of a grand jury. It does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that a law is being violated, or even because it wants assurance that it is not. When investigative and accusatory duties are delegated to an administrative body, it may take steps to inform itself

whether there is a probable violation of the law. *Id.* at 642, 643.

Respondents herein refer to several cases in which subpoenas have not been upheld. In these cases, the subpoenas at issue were unreasonably broad in their demands and general in their terms. In *People* v. *Keefe*, 36 Ill.2d 460, 233 N.E.2d 144 (1967), the description of the documents requested in the subpoenas was so insufficient that the respondents could not determine what was to be produced. In *People* v. *Lurie*, 39 Ill.2d 331, 235 N.E.2d 637 (1968), another case which the respondents cite, the Supreme Court held that a subpoena which demanded that a corporation produce its general ledger, accounts receivable and accounts payable, cash receipts and disbursements journals, payroll ledger, bank statements and cancelled checks was unreasonably broad. The documents provided only a tenuous relationship to the investigation being conducted.

In this case, the information sought is specific and limited and relates to information and allegations in the Administrator's possession which compel resolution.

CONCLUSION

The information in the Administrator's possession is suggestive of substantial misconduct. If such is the case, the interests of the Court, the profession, and the public require that formal charges be brought. If such is not the case, respondents are entitled to be exonerated. In either case, the information sought is necessary in order that the question be resolved. If the Administrator is not allowed to go forward in matters such as these, effective disciplinary enforcement is impossible.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERRY & GORE, LTD.,

Petitioner,

v.

ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent Administrator's brief opposing the present Petition erroneously asserts that the Illinois Supreme Court's Order of August 18, 1983, denying Petitioner's motion to quash the subpoena duces tecum issued by the Clerk of that court, is not a final judgment or decree, and hence is not appealable under 28 U. S. C. § 1257(3). At issue in the present proceeding is the scope of the Administrator's authority to embark upon an unauthorized fishing expedition by conducting

a general audit of a law firm's bank accounts, absent express authorization for such action or due process safeguards to prevent its abuse. Resolution of this federal issue is conclusive with respect to the course of the Administrator's investigation in the proceedings below. If Petitioner prevails, the Administrator will not be allowed to conduct his anticipated audit. Accordingly, the Order of the Illinois Supreme Court meets the first exception to the requirement of finality discussed by this Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 479 (1975). And, as noted by the Court in *Cox Broadcasting, id.*, "To dismiss the appeal would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets," *quoting, Mills* v. *Alabama*, 384 U. S. 214, 217-18 (1966).

Moreover, the present proceeding does not involve a motion to quash a subpoena duces tecum issued by a grand jury in a criminal investigation, as in *Cobbledick* v. *United States*, 309 U. S. 323 (1940). Rather, this is an attorney disciplinary proceeding raising distinct considerations. For example, unlike *Cobbledick*, Petitioner here does not have the option of facing a contempt citation for failure to comply with the subpoena. Instead, Illinois Supreme Court Rule 754, *Ill. Rev. Stat.* ch. 110A, § 754 (1983), merely provides: "The Administrator . . . may report to the Court the failure or refusal of any person . . . to produce the items specified in the subpoena *duces tecum*." Given the discretionary nature of this framework, coupled with the complete discretion of the state court over the disciplinary process, it is possible that a meaningful review by this Court of a substantial federal question would be forever precluded if not undertaken at this juncture.

Finally, the right involved is, in essence, "separable from and collateral to" the merits of the underlying investigation. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949).

The Order of the Illinois Court denying Petitioner's motion finally determined the merits of Petitioner's claim that the compliance with the subpoena would deprive it of rights protected by the Fourth and Fourteenth Amendments without any necessary procedural safeguards. *See, e.g. National Socialist Party* v. *Village of Skokie,* 432 U. S. 43, 44 (1977). As noted in *Cox Broadcasting, supra:* "In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U. S. at 483.

In sum, this court has repeatedly observed that the final-judgment rule is not to be administered in a mechanical fashion and that circumstances exist in which a departure from this requirement for purposes of federal appellate jurisdiction is warranted. *See, e.g. Cox Broadcasting, supra,* 420 U. S. at 477; *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945). Here, the Illinois Supreme Court has peremptorily upheld the Administrator's authority to engage in a completely unauthorized fishing expedition of petitioner's records, *sans* the restrictions of any due process safeguards and in violation of Petitioner's substantial rights under the Fourth and Fourteenth Amendments. This is a circumstance which warrants immediate review.

Respectfully submitted,

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